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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS MILLE LACS BAND OF CHIPPEWA INDIANS, ARTHUR GAHBOW, WALTER SUTTON, CARLEEN BENJAMIN AND JOSEPH DUNKLEY

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QUESTION PRESENTED

Did the 1855 treaty cession of "all right, title and interest . . . in, and to . . . lands" abrogate the Mille Lacs Band's guaranteed privilege to hunt, fish and gather within the territory ceded in the 1837 treaty, where, after a careful examination of the historical record, the district court found that neither party to the 1855 treaty intended the treaty to extinguish usufructuary rights guaranteed by earlier treaties?

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STATEMENT OF THE CASE

Respondent Mille Lacs Band of Chippewa Indians submits this brief to address the petitioners' argument that the 1855 treaty abrogated the Mille Lacs Band's 1837 treaty hunting, fishing and gathering privilege.[1] Pet. Br. at 40-49. As petitioners' brief acknowledges (at 41, n.17), this argument affects only the rights of the Mille Lacs Band because the other respondent bands were not parties to the 1855 treaty. We show that the 1855 treaty was intended and understood by the parties to extinguish all of the Chippewa's remaining *land* claims, but was not intended or understood to affect the 1837 treaty hunting and fishing privilege, which existed independently of any right to or interest in the lands ceded in that treaty.

I. Historical Background.

A. In 1837, the United States and the Chippewa entered into a treaty involving the cession of Chippewa lands in present-day Wisconsin and Minnesota lying north of the boundary between Chippewa and Sioux territory established in the 1825 Treaty of Prairie du Chien.[2] 1837 Treaty with the Chippewa,

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1. The Band refers the Court to the briefs of respondents St. Croix Band et al. and Fond du Lac Band et al. for responses to petitioners' other arguments.

2. The 1825 Treaty of Prairie du Chien established boundaries among indigenous groups occupying territory west of Lake Michigan. 7 Stat. 272 (Aug. 19, 1825). The boundary line dividing Chippewa from Sioux territory to the south started at the Chippewa River in present-day Wisconsin, extended generally northwest through Minnesota to the Red River of the North along the present-day border between Minnesota and North Dakota, and then proceeded north along the Red River to its confluence with the Goose River (between Fargo and Grand Forks). *See* map at Joint Appendix ("JA") 621. No boundary was established north or west of this point, although it was later learned that the Pillager and Red Lake Chippewa had claims to these northwestern areas. *See* Petition Appendix ("PA") 287.

7 Stat. 536 (PA 484); *see* App. JA 956 (App. A attached) for boundaries of 1837 cession. The Chippewa survived in this territory by hunting, fishing and gathering, and by planting crops such as corn and squash. PA 221. Fish and game were abundant and there was no shortage of land open to hunting and fishing by the Chippewa or to the handful of pioneering American settlers who had entered the territory. PA 221-23, 334.

The 1837 treaty negotiations are described in great detail in the district court's findings. PA 229-34. The Chippewa agreed to sell the lands desired by the United States, but insisted on reserving "the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore." PA 233; JA at 75. Governor Dodge responded that he would "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them." PA 233; JA 78. Accordingly, in Article 1 of the 1837 treaty, the Chippewa bands "cede[d] to the United States all that tract of country encompassed within [defined] boundaries" (*see* App. A attached), while Article 5 provides:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.[3]

PA 484, 486.

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3. In an 1842 treaty, the Chippewa ceded additional lands in Wisconsin and the upper peninsula of Michigan while again reserving hunting and fishing rights on the ceded lands. 1842 Treaty with the Chippewa, 7 Stat. 591, *see* App. A attached.

In 1847, the Commissioner of Indian Affairs proposed a new treaty with the Chippewa to acquire two tracts of land immediately west of the 1837 cession for resettlement of the Winnebego and Menominee Indians, and to obtain a cession of the Chippewa's remaining lands east of the Mississippi. PA 244; *see* App. A attached. The Commissioner also hoped to maintain the fiction that all remaining Chippewa lands belonged equally to all Chippewa bands, despite the fact "that different bands claim the exclusive title to different portions of it." PA 245-46. The Commissioner's instructions were accompanied by a memorandum and map describing the lands ceded by the Chippewa in 1837 and 1842 and those to be acquired from them in the proposed treaty. JA 131-33. The memorandum describes a line on the map, JA 133 (App. B attached), running from the headwaters of the Mississippi north to the Canadian border, which was "the *Eastern* line of the country represented to be claimed by certain bands of Chippewa termed 'Pillagers.' " JA 131-32 (emphasis added). The map designates land in northern Minnesota as "Chippewa Country" but shows no western boundary on the "Chippewa Country" or the lands claimed by the Pillagers. App. B attached. The district court found that continued uncertainty about the nature and full extent of Chippewa land claims in this area led to the broad cession language in the 1855 treaty. PA 285-88; *see* pp. 10-11 below.

The 1847 treaty negotiations were conducted by Isaac Verplank and Henry Rice, a major fur trader.[4] PA 246. The negotiations were largely a failure because no lands east of the Mississippi were obtained and the negotiators were unable to maintain the fiction of a single Chippewa nation, as the Chippewa insisted that the consideration for the cession must go disproportionately to the bands who had actually used the ceded lands. PA 246-47; App. A attached.

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4. By 1855, Rice was the Minnesota Territory's delegate to the House of Representatives and he played a major role in the planning and negotiation of the 1855 treaty. PA 276, 281-82.

As noted by the district court, the Commissioner's 1848 and 1849 annual reports continued to advocate the purchase of Chippewa lands east of the Mississippi and explained that the Chippewa owned or possessed lands that included the headwaters of the Mississippi River and extended north to the border with Canada and west to the Red River. PA 286-87; *see also* JBA 105, 118-19 and App. A attached.[5] The Commissioner's 1850 report added that "the Red lake bands and the Pillagers claim, by title of conquest and actual possession, a large tract of country lying *west* of [the] Red River." PA 287; JA 187 (emphasis added).

B. On May 1, 1854, the House of Representatives debated a bill "to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them in the Territory of Minnesota and the State of Wisconsin." PA 272; JA 248. The bill's House sponsor explained that it would authorize a new treaty to extinguish the Indians' title "to the lands which they own in the Territory of Minnesota and to a small portion in the State of Wisconsin."[6] JA 249. During the subsequent Senate debate, the Chairman of the Senate Committee on Indian Affairs explained that the bill prescribed that "the Indians shall not be removed from the territory, but shall be placed upon individual reservations," and "*reserve[d] to them those rights which are secured by former treaties.*" 23 Cong. Globe, 33rd Cong., 1st Sess. 1403-04 (June 15, 1854)

5. JBA refers to the Joint Band Appendix filed by the Mille Lacs and Wisconsin Bands in the court of appeals.

6. The "small portion" refers to strip of land along the Minnesota-Wisconsin border that had been excluded from the 1842 treaty cession as a result of a surveying error. Earlier in 1854, the Wisconsin legislature had memorialized the President and Congress to extinguish the Indians' title to "a tract of land about three-fourths of mile in width . . . lying along the boundary line between the state of Wisconsin and the territory of Minnesota, within said state of Wisconsin." JA 246-47.

(emphasis added). The bill passed the House but was tabled by the Senate until December 1854. PA 272, 275.

Although the bill had not passed the Senate, on August 11, 1854, Commissioner of Indian Affairs George Manypenny wrote to Indian Agent Henry Gilbert instructing him to initiate treaty negotiations with representatives from the Chippewa bands residing between the Mississippi River and Lake Superior in order to acquire "all the country [the Chippewa] now own or claim in the territory of Minnesota, the State of Wisconsin or elsewhere," except for land that would be used to establish reservations. PA 273; JA 264. Manypenny enclosed the 1847 treaty instructions and the map (App. B attached), which showed the extent of Chippewa country and the Pillager land claims extending west to the Red River and beyond. JA 265, 267. On August 12, 1854, Manypenny supplemented these instructions, instructing Gilbert that if the location of the Chippewa reservations made the provisions for farmers, blacksmiths and other services in former treaties of no use, he should insert in the new treaty a provision "cancelling . . . these provisions."[7] PA 273; JA 269. Manypenny did not suggest the cancellation of hunting and fishing rights reserved in earlier treaties. PA 273.

The 1854 treaty was signed in September by those Chippewa bands residing in the vicinity of Lake Superior and along the Mississippi River. 1854 Treaty with the Chippewa, 10 Stat. 1109 (PA 490). For unexplained reasons, the Mille Lacs Band was not a party to the 1854 treaty despite its use of a portion of the territory ceded by that treaty as a hunting ground. PA 273. On October 17, 1854, Agent Gilbert transmitted the treaty to Commissioner Manypenny with an explanatory letter. PA 273; JA 270. According to Gilbert, the Mississippi Chippewa bands refused to sell their remaining lands "on any terms," and there was "much jealousy

7. For example, Article 2 of the 1837 treaty provided for the payment of non-Indian farmers and establishment of three blacksmith shops at points to be designated by the government. PA 485.

and ill-feeling" between the Mississippi and Lake Superior bands. PA 273; JA 271. Gilbert solved these problems by persuading the Chippewa to establish a boundary line between the Lake Superior and Mississippi bands, convincing the Mississippi bands to relinquish their claims to the lands occupied by the Lake Superior bands, and then inducing the Lake Superior bands to cede their title to the United States. PA 273; JA 271-72; *see* App. A attached (for boundaries of 1854 cession). Payment for the cession included "two hundred guns, one hundred rifles, five hundred beaver traps, [and] three hundred dollars worth of ammunition." PA 494. Article 2 established reservations for the signatory bands within the 1837, 1842 and 1854 cessions. PA 491-92. The 1854 treaty does not contain a provision abrogating hunting and fishing rights secured by earlier treaties, but instead, in Article 11, establishes *new* treaty hunting and fishing rights in the territory ceded in the treaty. PA 495.

The district court found that preservation of off-reservation hunting and fishing rights was not inconsistent with Commissioner Manypenny's policy of establishing reservations. PA 289. Many of the more than 40 treaties negotiated during Manypenny's tenure expressly reserve the Indians' right to hunt and fish off-reservation,[8] and only one, the 1855 Treaty with the Chippewa of Sault Ste. Marie, 11 Stat. 631, expressly extinguished an off-reservation hunting, fishing, or gathering right, and that followed destruction of a fishery by a government canal project. PA 289. The Chippewa were told by treaty negotiator Henry Gilbert in 1854 that the reservations "were not to confine us all together to live upon them — that we should have the privilege of going out of [them] whenever we had a mind for hunting purposes." PA 274; JA 381.

8. *See, e.g.*, Treaty with the Nisqually, Puyallup, etc., 10 Stat. 1132 (1854); Treaty with the Dwamish, Suquamish, etc., 12 Stat. 927 (1855); Treaty with the S'Klallam, 12 Stat. 933 (1855).

On December 8, 1854, Manypenny forwarded the 1854 treaty, along with Gilbert's October 17 letter, to Secretary of the Interior McClelland. PA 275; JA 283. He recommended that the Secretary delete two objectionable provisions, relating to payments to be made to certain chiefs, but expressed no concern about the 1854 treaty's reservation of hunting and fishing rights on ceded lands.[9] PA 275; JA 283. The Senate passed the bill regarding extinguishment of Chippewa title to their remaining lands on December 17, 1854, and the President signed it on December 19. PA 275, 532. On December 20 the President forwarded the 1854 treaty to the Senate without change, and the Senate ratified it on January 10, 1855. PA 275; JA 282.

C. On December 17, 1854, the day the Senate passed the authorizing legislation discussed above, Henry Rice, then Minnesota's territorial delegate to Congress, notified Commissioner Manypenny of the bill's passage and recommended that a treaty be negotiated in Washington with the Mississippi, Pillager and Lake Winnibigoshish bands.[10] PA 276. According to Rice, those bands

> own[ed] all the lands drained by the waters of the Mississippi, *a part of the lands on the Red river of the north (from its source on down) and also the lands*

9. Commissioner Manypenny never indicated that the hunting and fishing provision conflicted in any way with the "extinguishment of Indian title," which was the primary object of the 1854 and 1855 treaties. JA 1361-62 (Newell Cross Examination)

10. The "Mississippi" bands occupied lands along the Mississippi River near the Crow Wing agency, while the "Pillager and Lake Winnibigoshish bands" resided in the vicinity of Leech Lake at the headwaters of the Mississippi. *See* App. A attached (for location of geographical references).

> *situate[d] north of the Mississippi and to the British possessions.*[11]

PA 276; JA 286-87 (emphasis added); *see* App. A attached.

On January 4, 1855, Commissioner Manypenny wrote to Territorial Governor Willis Gorman, directing him to have a Chippewa delegation brought to Washington for negotiations "respecting their claims to lands in Minnesota." PA 276; JA 288. Following Rice's advice, Manypenny asked Gorman to send " 'Hole in the Day' and six other principal chiefs of the Chippewa Indians of the Mississippi" and, if possible, " 'Flat Mouth' and two other chiefs of the Pillagers and the principal and two other chiefs of the bands near Lake [Winnibigoshish]." PA 276; JA 288. Manypenny did not ask Gorman to inform the Chippewa that the negotiations would involve the extinguishment of the 1837 treaty hunting and fishing privilege or ask him to send the other Chippewa bands who hunted and fished in the 1837 ceded territory. PA 277.

The 1855 treaty was negotiated between February 12 and 22, 1855. PA 277. Hole-in-the-Day served as spokesman for the Mississippi bands and Flat Mouth was the principal spokesman for the Pillager and Lake Winnibigoshish bands. PA 277-78. Commissioner Manypenny represented the United States. PA 278. The Mille Lacs delegation arrived at some point after the start of the proceedings, but no statement is attributed to them until after the treaty was signed. PA 277-78. All discussions were conducted through interpreters. PA 278. Commissioner Manypenny observed that

> one great impediment to a good understanding between the government and the Indians arose from the fact

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11. Rice's description reflects the information and the map provided to him with the 1847 treaty instructions. JA 131-33 and App. B attached. *See* p. 3 above.

> that the latter cannot read or understand the contracts which they make.

PA 278; JA 305 (1855 Treaty Journal).

The district court found that the Chippewa understood that the purpose of the treaty was the sale of their remaining lands in northern Minnesota and repeated this understanding during the negotiations. PA 279. For example, at one point the Pillager representative, Flat Mouth, remarked: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." PA 279; JA 309 Commissioner Manypenny's response did nothing to alter this understanding:

> He appears to understand the object of this interview. His people had more land than they wanted or could use, and stood in need of money; and I have more money than I need, but want more land.

PA 279; JA 309. At another point, Hole-in-the-Day said to Commissioner Manypenny: "Your words strike us in this way. They are very short. 'I want to buy your land.' These words are very expressive — very curt." PA 279; JA 304. The district found that the negotiations focused largely on the estimated number of acres and the price per acre. PA 279. Although there were discussions about the desirability of the Chippewa settling down as farmers, the district court found that a cession of the Chippewa's 1837 treaty hunting and fishing privilege was never proposed. JA 284. The district court also found that in 1855 the Chippewa depended on hunting, fishing and gathering for their survival and would not knowingly have relinquished their special hunting and fishing privilege without discussion. PA 298, 325.

The treaty was signed on February 22, 1855. Article 1 contains two sentences. The first cedes a defined tract of land:

> The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, and included within the following boundaries. . . .

1855 Treaty with the Chippewa, 10 Stat. 1165 (PA 502-03). The defined tract is north and northwest of the 1837 cession, but does *not* include all of the unceded lands in Minnesota north to the Canadian border, or west to the Red River and beyond. *See* App. A attached (showing two remaining tracts of unceded land to the north and west of 1855 cession). Thus, it does not include a significant portion of the lands that Manypenny understood were claimed by the Lake Winnibigoshish and Pillager bands, in light of the 1847 map he forwarded to Gilbert in preparation for the 1854 treaty negotiations (JA 267 and App. B attached), the 1848, 1849 and 1850 annual reports, and Rice's December 17, 1854, letter. PA 286-88. The district court found that the following second sentence of Article 1 was included to extinguish these additional, ill-defined land claims:

> And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere. [PA 503].

See PA 286-88.

In support of its finding, the district court cited Commissioner Manypenny's February 23, 1855, transmittal letter to Secretary of the Interior McClelland, which states:

> I have the honor to transmit . . . articles of agreement and convention, concluded upon yesterday, with the Mississippi, Pillager and Lake Winnibigoshish bands of Chippewa Indians, in Minnesota, by which they cede and convey to the United States all the lands owned and claimed by them in that Territory, and whatever right or interest they may have in other lands in common with other Indians there or elsewhere.
>
> The quantity of land ceded, according to the boundaries defined in the first article, is estimated at from eleven million to fourteen millions of acres, *besides which, those Indians (and especially the Pillager and Lake Winnibigoshish bands) have some right [or] interest in a large extent of other lands in common with other Indians in Minnesota, which right or interest, as above stated, is also ceded to the United States.*

PA 285-86; JA 291-92 (emphasis supplied by district court). The district court found that the emphasized passage refers to the second sentence of Article 1, which was added to the treaty to ensure that the Pillager and Lake Winnibigoshish Chippewa did not have any remaining claims to unceded lands located north and west of the territory ceded in the first sentence of Article 1. PA 286; *see* App. A attached (for location of these unceded lands). Manypenny's transmittal letter makes no mention of the 1837 treaty privilege. PA 288; JA 291-94.

The district court found that the Chippewa would have understood the treaty language to extinguish their remaining

land claims, not their treaty hunting and fishing rights. PA 324. The words "relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be," have no Chippewa equivalent, and any attempt to translate them literally would have had no meaning in Chippewa. PA 284; JA 857-62 (Report of Dr. Nichols). The most likely translation of this language would have indicated that the Chippewa were ceding all of their remaining lands in the same way that they had ceded portions of their lands in 1837, 1842 and 1854, but "would not have been understood to affect the hunting, fishing, and gathering provision in the 1837 treaty." PA 284; JA 861-62.

Article 2 of the 1855 treaty reserved lands for the "permanent homes" of the Indians. PA 503-04. The Mille Lacs Reservation was established on the southern shore of Mille Lacs Lake, within the 1837 ceded territory, and in close proximity to the Band's traditional fishing grounds and wild ricing areas. PA 283; *see also* JA 749-750 (Report of Dr. Cleland); JA 1368-69 (Newell Cross) and App. A attached (for location of Mille Lacs Lake). Article 3 provides the consideration for the land cession, including "guns, traps &c." as well as gunpowder, lead and gilling twine. PA 283, 509. Article 9 provided that the Chippewa would

> settle down in the peaceful pursuits of life, commence the cultivation of the soil . . . and [undertake] such other objects of improvement and convenience, as are incident to well regulated society,

but did not confine the Chippewa to their reservations or prohibit them from continuing to hunt and fish off-reservation. PA 283-84, 512-13.

D. While the 1855 negotiations were underway in Washington, a controversy was brewing in Minnesota over a lumbering dam on the Rum River, just south of Mille Lacs Lake and within the 1837 ceded territory. PA 269; *see* App. A (for location of Rum River). The Mille Lacs Chippewa threatened to tear out the dam because it was flooding their wild rice crops. PA 269. On February 16, 1855, Governor Gorman wrote to Commissioner Manypenny to notify him about the conflict and explained that the Mille Lacs Band had "no other treaty interests [in the pertinent area] *except hunting and fishing.*"[12] PA 270; JA 295-96 (emphasis added). Although the correspondence reached Commissioner Manypenny after the 1855 treaty was signed, the Commissioner never wrote back to suggest that the 1855 treaty extinguished the Band's hunting and fishing right. Instead, a compromise was brokered in July 1855 in which the lumbermen agreed to compensate the Band for the loss of its rice crop. PA 271 and n.13.

About two weeks after the treaty negotiations concluded, the Chippewa again met with Commissioner Manypenny in Washington. The parties agreed that the annual payments required under the treaty would be made in early September, to avoid disruption of fall fisheries. PA 289-90; JA 751-52 (Report of Dr. Cleland). Commissioner Manypenny encouraged the Chippewa to continue trapping and selling furs, and gave no indication that these vocations would be affected by the 1855 treaty. PA 290, JA 751.

Although Minnesota first enacted fish and game regulations in the year of its admission, the district court found that it did not begin to enforce such laws systematically until 1892. PA 298. The court found that Chippewa repeatedly protested,

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12. Gorman reiterated this point in a letter to the Chippewa, but insisted that they had no right to remove the dam because it was on ceded lands. PA 271.

claiming these enforcement efforts violated their rights under the 1837, 1842 and 1854 treaties. PA 326; *see also* JA 1804. Notwithstanding complaints from non-Indians about Chippewa off-reservation hunting and fishing, there is only a single instance, in 1926, approximately 70 years *after* the treaty was signed, in which federal officials even arguably suggested that the 1855 treaty affected the Chippewa's right to hunt and fish under the 1837 treaty.[13] PA 299-300; JA 543-44.

The district court also found that throughout the latter half of the 19th and the early part of the 20th century, the Mille Lacs Chippewa continued to hunt and fish in the 1837 ceded territory, despite the efforts of some in state government to either confine them to their reservation or have them removed to the White Earth Reservation in northwestern Minnesota. PA 292-98. Moreover, the United States affirmatively supported Chippewa off-reservation hunting, fishing and gathering, by supplying guns, traps, fish nets and other gear, and agreeing to make annuity payments at times that would not interfere with these activities. PA 293. Although Mille Lacs Chippewa have long since "settle[d] down in the peaceful pursuits of life," the trial testimony of three Band members demonstrated that they continue to hunt, fish and gather for subsistence and to sustain their cultural and religious life. PA 220, 326.

II. Procedural Background.

In August 1990, the Mille Lacs Band and four of its members filed a complaint against the petitioners alleging that enforcement of State fish and game laws violated the Band's rights under the 1837 treaty. PA 214-15. The petitioners' answer raised the 1850 executive order and 1855 treaty as affirmative

13. The 1926 letter suggested that Article 5 of the 1837 treaty was "modified" by the 1855 treaty to the extent that the lands in question were "within any of the land ceded" in 1855. JA 543-44.

defenses, but did not raise the Minnesota Admission Act or the equal footing doctrine. PA 216. The district court divided the litigation into phases: the first to determine the existence, nature and scope of the right, and the second to address implementation of the right. PA 217-18. In 1993, following the Minnesota state legislature's rejection of a settlement agreement signed by the Band and State executive officials, nine counties and six private landowners intervened as defendants and the United States intervened as a plaintiff. PA 72, 217.

The Phase I trial occurred over three weeks in June and July 1994, during which the district court heard extensive live testimony and received into evidence hundreds of exhibits. PA 218. Upon review of this extensive evidentiary record, the district court made detailed findings regarding the historical circumstances surrounding the negotiation of the 1837 and 1855 treaties as well as the issuance and subsequent repeal of the 1850 executive order. PA 220-301. Based on comprehensive findings of fact (PA 272-301), the district court concluded that "[n]either the United States nor the Chippewa intended to extinguish in the 1855 treaty the usufructuary privilege guaranteed by the 1837 treaty."[14] PA 331. The district court ruled that the Mille Lacs Band's 1837 treaty hunting and fishing rights continued to exist, but also held that these rights could only be exercised on land open to public hunting and fishing because the 1837 treaty did not provide the Chippewa with any rights of access.[15] PA 334, 337-38. After Phase II proceedings, the district court entered final judgment in 1997. PA 158-64.

14. The petitioners disingenuously characterize the district court's discussion of the evidence as "abbreviated." Pet. Br. at 45. Ironically, their petition for certiorari took the district court to task for its "elaborate recital of evidence" regarding the 1855 treaty. Cert. Pet. at 19.

15. The district court also rejected, on three separate grounds, the petitioners' 1850 executive order defense. PA 304-21.

The Eighth Circuit affirmed the district court's Phase I decision in its entirety. PA 72. With respect to the petitioners' 1855 treaty defense, the court of appeals concluded "that the district court's factual findings regarding the intentions of the parties to the 1855 Treaty are well supported" and not "clearly erroneous." PA 37. The court of appeals' conclusion was based on

> the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process, and the lack of evidence that the parties intended to extinguish these rights.

PA 37-38.

SUMMARY OF ARGUMENT

In the first sentence of Article 1 of the 1855 treaty, the Chippewa ceded lands within a defined boundary, and in the second sentence they ceded "any and all right, title and interest . . . in, and to any other lands" in Minnesota or elsewhere. PA 503. This language does not extinguish the Mille Lacs Band's 1837 treaty privilege for the following reasons. First, because the 1837 treaty privilege provides no right of access to land, it is not a "right to" or "interest in" land. Rather, like a modern-day hunting or fishing license, it guarantees the Chippewa a non-exclusive privilege to engage in the specific *activities* of hunting and fishing on lands and waters otherwise open to the public. No one would contend that a modern hunting or fishing license conveys an interest in land, and the 1837 privilege did not do so either.

Second, even if the 1837 privilege technically might be characterized as a right to or interest in land, the 1855 treaty cannot be construed based on the technical meaning of its words to learned lawyers, but must be interpreted according to the

sense in which the language would have naturally been understood by the Indians. Based on repeated statements of government officials before, during, and after the treaty negotiations, the Chippewa understood that the treaty extinguished all of their remaining land claims, but not the special hunting and fishing privilege guaranteed by the 1837 treaty. Any ambiguities in the treaty language should, moreover, be resolved in the Indians' favor.

Third, the district court found that there was no evidence that either party to the 1855 treaty intended to extinguish the Chippewa's 1837 treaty hunting and fishing rights. Instead, the parties intended that the 1855 treaty would extinguish all of the Chippewa's remaining *land* claims. The evidence considered by the district court included: (1) the 1854 treaty which preserved the 1837 treaty privilege of the other bands party to this case and established new hunting and fishing rights across millions of acres of northeastern Minnesota; (2) the 1854 authorizing legislation which mandated the extinguishment of all Chippewa land claims, but was expressly intended to reserve rights secured by former treaties; (3) the record of the 1855 treaty negotiations which contains extensive reference to the cession of Chippewa lands but no mention of treaty hunting and fishing rights; (4) Commissioner Manypenny's treaty transmittal letter which identifies the *specific* land claims the government intended to extinguish by the second sentence of Article 1 but which contains no hint that this language was intended to abrogate the 1837 treaty privilege; and (5) the Chippewa's dependence on hunting and fishing which makes it inconceivable that the Mille Lacs Band would have consented to a cession of a special treaty hunting and fishing privilege without any discussion.

The facts of this case thus diverge sharply from those in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), where the Court held that an *exclusive, on-*

reservation hunting and fishing right was ceded when a tribe relinquished all of its rights and interests in and to reservation land. Here, by contrast, the broad land cession language in the 1855 treaty does not encompass, and was not intended to encompass, the *non-exclusive* 1837 treaty privilege of hunting, fishing and gathering on the lands and waters of the 1837 *ceded* territory — a privilege which exists independently of any interest in the lands themselves.

ARGUMENT

I.

THE 1855 TREATY DID NOT EXPRESSLY ABROGATE THE MILLE LACS BAND'S 1837 HUNTING AND FISHING PRIVILEGE.

Relying on *Klamath*, the petitioners assert that the language of the second sentence of Article I of the 1855 treaty would "obviously appear to extinguish" the Mille Lacs Band's hunting and fishing rights under the 1837 treaty. Pet. Br. at 13. With no analysis, they ask the Court to accept their interpretation of the treaty language as "self-evident." *Id.* at 41. We show that the petitioners' interpretation is not self-evident, and that under this Court's prior cases, including *Klamath*, the 1855 treaty language does not constitute an express abrogation of the Mille Lacs Band's 1837 treaty privilege.

A. The Petitioners Disregard the Chippewa's Natural Understanding of the Treaty Language.

Determining how treaty language was understood by the treaty parties is a fundamental part of the interpretation of any treaty. *Eastern Airlines v. Floyd*, 499 U.S. 530, 536 (1991); *Air France v. Saks*, 470 U.S. 392, 399 (1985). But it is especially

important here given the Chippewa's inability to read and converse in ordinary English, much less the legal jargon employed in Article 1 of the 1855 treaty.[16] PA 278. The Court, for this reason, has repeatedly cautioned that Indian treaties "are not to be considered as exercises in ordinary conveyancing," *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970), and must " 'be construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would *naturally be understood* by the Indians.' " *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979) (emphasis added), quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

The district court's findings respecting the "sense" in which the words of the 1855 treaty "would naturally be understood by the Indians," do not support the proposition that the interpretation of the treaty language advanced by the petitioners would have been "self-evident" to the Chippewa. Pet. Br. at 41. Expert testimony established that the pertinent treaty language does not have a Chippewa equivalent and could not have been translated literally into Chippewa. PA 284, 324; JA 857-62 (Report of Dr. Nichols). The most likely translation of the language would have been the Chippewa equivalent of "relinquish and transfer to the United States the lands." PA 284. This translation would not have conveyed any "sense" that the treaty relinquished of the 1837 treaty privilege, but instead would have "convey[ed] only that the Chippewa were giving up their remaining lands."[17] PA 284, 325. Because the

16. The facts of this case are unlike *Klamath*, 473 U.S. at 772, where the Indians could speak and understand English and were represented by attorneys.

17. Notably, the petitioners offered no evidence at trial about the Chippewa understanding of the second sentence of Article 1. Moreover, the petitioners' historian conceded that the second sentence of Article 1 was never specifically discussed in the treaty negotiations. JA 1369 (Newell Cross-Examination).

petitioners' interpretation of the 1855 treaty language ignores the *Chippewa's* natural understanding of the language, it was properly rejected.

B. The 1855 Treaty Language Does Not Clearly Extinguish the 1837 Treaty Privilege.

Even when read according to its technical legal meaning, the second sentence of Article 1 does not unambiguously extinguish the Mille Lacs Band's 1837 treaty privilege. The 1855 treaty neither mentions the 1837 treaty privilege nor provides a fixed sum payment for an alleged cession of the privilege. *Cf. South Dakota v. Yankton Sioux Tribe*, 522 U.S. __, 139 L. Ed. 2d 773, 787 (1998). This is in sharp contrast to language drafted by Commissioner Manypenny a few months later in the Treaty with the Chippewa of Sault Ste. Marie, which *expressly* revokes fishing rights reserved in an earlier treaty and provides compensation for the cession. 11 Stat. 631 (Aug. 2, 1855) ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's and of encampment, convenient to the fishing ground, secured to them by the treaty of June 16, 1820").[18] Commissioner Manypenny's

18. The court of appeals noted that similar express language has been used to revoke other usufructuary rights. PA 36-37. The 1830 Sauk and Fox treaty provided for the use of ceded lands for hunting and other purposes by "such . . . Tribes as the President may locate thereon." 7 Stat. 328. To extinguish that right, the 1837 Sauk and Fox treaty contains a specific "cession[ ] . . . [o]f all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th, 1830," in addition to a general cession of "all interest or claim by virtue of the provisions of any treaties." 7 Stat. 543. The 1846 Winnebego treaty pays "forty thousand dollars for release of hunting privileges, on lands adjacent to their present home," in addition to a payment of $150,000 for "the land." 9 Stat. 878. The 1865 Middle Oregon treaty provides that "the right to take fish, erect houses, hunt game, gather roots and berries, and pasture animals upon lands without the reservation set apart by the treaty aforesaid — [is] hereby relinquished," and provides compensation "for the relinquishment" of these rights. 14 Stat. 751.

failure to use here the kind of unambiguous language of cession used in the 1855 Sault Ste. Marie and other treaties strongly suggests that the government did not intend to abrogate the 1837 treaty privilege and by itself justifies a careful examination of all the historical circumstances to determine the intent of the parties. *Choctaw Nation*, 397 U.S. at 631 (rejecting a similar "plain meaning" argument where "the United States was competent to say the 'north side' or 'bank' of the Arkansas River when that was what it meant, as it had in [an earlier] grant to the Cherokees"); *see also Hagen v. Utah*, 510 U.S. 399, 412 (1994) (absence of language providing definite payment for alleged reservation diminishment "requires us to examine all the circumstances surrounding the opening of a reservation").

The petitioners argue that the kind of unambiguous language contained in the Sault Ste. Marie treaty was unnecessary here because the 1855 Chippewa treaty contains "all-encompassing relinquishment language." Pet. Br. at 48-49; *but see* n.18 above (discussing 1837 Sauk and Fox treaty). However, the 1855 treaty cession of all "right, title and interest . . . in and to . . . lands" does not "encompass" the 1837 hunting and fishing privilege unless the 1837 privilege is a "right to" or "interest in" lands. The petitioners provide no analysis to show that it is such a right or interest, and a review of the essential attributes of the privilege shows that it is not.

The lower courts held — and petitioners agree — that the 1837 treaty privilege secures no right of access or entry to lands.[19] PA 70, 337-38; *see* Pet. Br. at 35. Instead, the 1837

19. The district court reasoned that since Wisconsin territorial law allowed the public to hunt, fish and gather on all unenclosed, unposted and undeveloped lands and an abundant amount of land was open for these purposes, it was unnecessary to provide the Chippewa with a treaty right of access to land. PA 334. This is consistent with the parties' contemporaneous understanding of treaty hunting and fishing rights. (Cont'd)

treaty guarantees that the Chippewa can engage in the protected *activities* of hunting and fishing in areas otherwise open to public hunting and fishing. PA 71, 337-38; *see also Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321, 323-24 (W.D. Wis. 1991). The rights secured by the 1837 treaty are thus akin to those secured by a federal hunting and fishing permit, *see, e.g.*, 16 U.S.C. § 704 (permits allowing the taking of migratory birds), or the federal fishing privileges granted pursuant to the long-standing vessel licensing statutes analyzed in *Douglas v. Seacoast Products*, 431 U.S. 265 (1977). Such federal licenses have been held to provide "the 'authority . . . to carry on' the licensed activity," and therefore preempt certain discriminatory state regulations. *Id.* at 280-81, quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 212 (1824).[20]

(Cont'd)

See PA 271 (Gorman's understanding that the 1837 treaty gave the Chippewa an interest in harvesting wild rice but no right to interfere with the erection of a dam on ceded land); JA 381 (Chippewa understanding that hunting rights meant that "an Indian should not be permitted to trespass on a white man's or anybody else's property," but should be able "to go on government lands . . . whenever a man wants to go out and hunt and kill game"). A contrary holding would greatly expand the rights of the other Chippewa bands and have serious consequences for rights adjudicated in previous cases. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 207 n.11 (1975) ("claim of entitlement to hunt on fenced or posted land without permission of the owner would raise serious questions").

20. The Enrollment and Licensing Act of 1793 provided for registration and licensing of vessels to be employed in trading, whaling and fishing in United States waters. *Douglas*, 431 U.S. at 273. The Court has held that under the Act, States may impose upon federal licensees only those "reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power," *Douglas*, 431 U.S. at 277, a restriction somewhat analogous to the standards for state regulation of treaty hunting rights set out in *Antoine*, 420 U.S. at 207 (state may impose reasonable and necessary conservation measures that do not discriminate against the Indians).

Federal rights to take wild fish and game, whether secured by a federal permit or license or by a treaty guarantee, are not "rights to" or "interests in" land. Under the common law, wild fish and game are not considered part of the realty and are not subject to private ownership until reduced to possession. *McKee v. Gratz*, 260 U.S. 127, 137 (1922) (shellfish not "part of the realty" within the meaning of a state statute giving treble damages for interference with real property); *Geer v. Connecticut*, 161 U.S. 519, 526-30 (1896); *see also Douglas*, 431 U.S. at 290 (Rehnquist J. concurring and dissenting in part) (federal grant of "title" and "ownership" to land in Submerged Lands Act, 16 U.S.C. § 1311(a), "could not reasonably refer to free-swimming fish which are incapable of such ownership"). The prior holdings of this Court confirm that Indian treaties may secure important hunting and fishing rights, which are independent of any interests in land and which, by virtue of the Supremacy Clause, preempt inconsistent state regulations. *See Klamath*, 473 U.S. at 765-66 ("Indians may enjoy special hunting and fishing rights that are independent of any ownership of land"); *Antoine*, 420 U.S. at 207 & n.11 (upholding Indians' challenge to State fish and game regulations even though the Indians disclaimed any "entitlement to hunt on fenced or posted private land without prior permission of the owner").[21] Thus, while the 1837 treaty hunting and fishing privilege must be exercised in a particular locale, it is not a "right to" or "interest in" land. Had the treaty secured an analogous right, such as

21. Relying on *United States v. Winans*, 198 U.S. 371, 381 (1905), Thompson et al. argue that the 1837 treaty privilege is an "interest related to land." Th. Br. at 34. However, the treaty at issue in *Winans*, unlike the 1837 treaty, preserved the Indians' right of access to specific "usual and accustomed" fishing places. Moreover, the Court held in *Fishing Vessel*, 443 U.S. at 675, that the "specific provision for access in that treaty was intended to secure a greater right" to harvest the runs of anadromous fish. This "greater right," which protects the *activity* of fishing itself, is not a real property interest.

"the right, in common with the citizens of the United States, to travel upon all public highways," 1855 Treaty with the Yakimas, Art. III, 12 Stat. 951, no one would suggest that it was a "right to" or "interest in" lands.[22]

It is a "principle deeply rooted in this Court's Indian jurisprudence" that treaties must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Yakima County v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992), *see also Klamath*, 473 U.S. at 774. In *Yakima*, 502 U.S. at 268-69, the Court applied this rule to hold that statutory language authorizing state "taxation of land" did not encompass " 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land,' " and hence did not authorize a county excise tax on sales of tribally owned fee lands. Similarly here, the 1855 treaty explicitly extinguishes "right[s] . . . and interest[s] . . . *in, and to* . . . lands," but does not extinguish "interests related to lands" or "rights which may be exercised within a particular geographic area." As in *Yakima*, while the petitioners' interpretation of the 1855 treaty language perhaps does "not exceed the bounds of permissible construction," the Band's interpretation of the 1855 treaty language is not only "quite reasonable," 502 U.S. at 268, but also accords with the Chippewa's "natural understanding" of the language. *Fishing Vessel*, 443 U.S. at 675-76. Under these circumstances, the district court properly undertook a "careful examination" of the circumstances surrounding the 1855 treaty, and resolved

22. Likewise, the holder of a federal license to trade on an Indian reservation under 25 U.S.C. § 261 *et seq.* does not possess a "right to" or an "interest in" reservation lands; instead the license provides federal authority to engage in the activity of trade and commerce within a designated area, and limits the state's power to regulate that activity. *See Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685, 691 (1965).

any ambiguities in the treaty language "for the benefit of the Tribe." *Yakima*, 502 U.S. at 269; *Klamath*, 473 U.S. at 774.

C. The Petitioners' Argument Is Not Supported by *Klamath*.

Notwithstanding the ambiguities in the treaty language and the evidence that the Indians would not have understood the language to affect their 1837 hunting and fishing privilege, the petitioners insist that under *Klamath*, the 1855 treaty nevertheless must be construed as "effective to extinguish previously reserved hunting and fishing rights." Pet. Br. at 42. *Klamath* involved rights provided in an 1864 treaty which created a 1.9 million-acre reservation and secured "the *exclusive* right of taking fish in the streams and lakes, *included in said reservation*, and of gathering edible roots, seeds and berries *within its limits*." 473 U.S. at 755 (emphasis added). The treaty required the Indians to "remove to said reservation and remain thereon" and provided for *no* off-reservation usufructuary rights. *Id.* at 767. Due to a surveying error, approximately 600,000 acres of land was erroneously excluded from the reservation.[23] *Id.* at 757. In 1901, the Tribe agreed to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to" the lands excluded from the reservation by the survey. *Id.* at 760.

The Court acknowledged that "Indians may enjoy special hunting and fishing rights that are independent of any ownership

23. The petitioners mistakenly contend that the rights at issue in *Klamath* were non-exclusive, off-reservation rights. Pet. Br. at 43. While the United States had erroneously allowed entry to reservation land, the Klamath Tribe still legally held exclusive hunting and fishing rights on these lands under the terms of the 1864 treaty. The Court rejected the Tribe's claim that these exclusive, on-reservation rights were somehow converted to non-exclusive, off-reservation rights by the cession of reservation land. *Klamath*, 473 U.S. at 769-70 & n. 20.

of land," *id.* at 765-66, but held that the exclusive hunting and fishing rights secured under the 1864 Treaty were appurtenant to the reservation and ceded when the reservation was diminished in 1901. *Id.* at 768. "More important[ ]" than the broad language of cession was the fact that the 1864 treaty "plainly describe[d] rights intended to be exercised within the limits of the reservation." *Id.* at 766. The Court reasoned:

> The fact that the rights were characterized as exclusive forecloses the possibility that they were intended to have existence outside of the reservation; no exclusivity would be possible on lands open to non-Indians. Moreover, in view of the fact that Article I restricted members of the Tribe to the reservation . . . , it is manifest that the rights secured to the Indians by that same Article did not exist independently of the reservation itself.

Id. at 767-68. The Tribe's later claim of a special, *non*-exclusive, *off*-reservation right was inconsistent with the terms of the 1864 treaty. *Id.* at 770.

In contrast to the Klamath Tribe's exclusive, on-reservation hunting and fishing right, which was relinquished when the boundaries of its reservation were diminished, the Mille Lacs Band's 1837 treaty privilege was always a *non*-exclusive right that could be exercised on *ceded* lands. It is the very type of "special hunting and fishing right" recognized by the Court in *Klamath* to exist "*independent* of any ownership of land."[24] 473

24. The five cases cited by the Court for this proposition all involved *non*-exclusive hunting, fishing or gathering rights reserved by treaties or agreements on *ceded* lands. In *Antoine*, the Indians ceded "all their right, title, claim and interest in" the land, while reserving "the right to hunt and fish *in common with* all other persons on lands not (Cont'd)

U.S. at 765-66 & nn. 16-17 (emphasis added). Given the rationale of *Klamath*, a non-exclusive hunting and fishing right which is expressly secured by treaty on ceded lands (but which secures no right of access to such lands) can survive a later cession of all "right, title and interest . . . in, and to . . . lands."[25]

Furthermore, the holding in *Klamath* did not rest solely on the bare language of the 1901 Agreement, but instead turned on the Court's "careful examination of the entire record," which showed that the Tribe's exclusive hunting and fishing right "was not intended to survive as a special right to be free of state regulation" after the lands were ceded. 473 U.S. at 774. Indeed, even outside the Indian context, such a careful review of the historical circumstances is an essential aspect of treaty interpretation. *Eastern Airlines v. Floyd*, 499 U.S. at 535 (because "treaties are construed more liberally than private

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allotted to said Indians." 420 U.S. at 196, 208 (emphasis added). Similarly, *Fishing Vessel*; *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), and *Winans*, involved the Stevens treaties where the Indians ceded "their interest in most of the Territory," while reserving a "right of taking fish at all usual and accustomed places, *in common with* citizens of the Territory." *See Fishing Vessel*, 443 U.S. at 662 (emphasis added). Finally, in *Kennedy v. Becker*, 241 U.S. 556, 562 (1916), the Tribe ceded a tract of land while reserving what the Court found to be a non-exclusive "privilege of fishing and hunting" on that tract.

25. By contrast, aboriginal hunting and fishing rights, unsecured by treaty, are merely incidents of original Indian title which, unless specially reserved, are extinguished when the lands are ceded. *Klamath*, 473 U.S. at 766; *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom.*, *Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980). Thus, a holding that the Mille Lacs Band's 1837 treaty privilege survived the 1855 cession of all interests in land would not resurrect the aboriginal hunting and fishing rights extinguished in numerous other land cession treaties.

agreements," courts may "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); *Saks*, 470 U.S. at 396. The district court's careful, fact-based review of the circumstances surrounding the 1855 treaty, and its determination based on that review that the 1855 treaty did not extinguish the Mille Lacs Band's 1837 treaty privilege, is thus entirely consistent with *Klamath* and the Court's other treaty interpretation precedents.

II.

THE DISTRICT COURT'S CAREFUL EXAMINATION OF THE HISTORICAL RECORD SHOWS THAT THE PARTIES DID NOT INTEND TO EXTINGUISH THE MILLE LACS BAND'S 1837 TREATY PRIVILEGE.

"In the absence of an explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *United States v. Dion*, 476 U.S. 734, 739 (1986), quoting *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Fishing Vessel*, 443 U.S. at 690. Because the Court will not construe statutes as abrogating treaty rights in "a backhanded way," treaty abrogation will be found only if Congress' intention to abrogate Indian treaty rights is "clear and plain." *Yankton Sioux*, 139 L. Ed. 2d at 786; *Dion*, 476 U.S. at 738-39. Because the language of the 1855 treaty did not unambiguously extinguish the Mille Lacs Band's 1837 hunting and fishing privilege, the petitioners were required to demonstrate through evidence in the historical record that the parties to the treaty clearly intended to extinguish the treaty privilege. The petitioners failed to meet these exacting standards.[26]

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26. Instead, the petitioners try to turn these standards on their head by asserting that the historical evidence "must essentially be conclusive in

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A. There is No Evidence the United States Intended to Abrogate the Mille Lacs Band's 1837 Hunting and Fishing Rights.

The district court found no evidence that the United States intended to abrogate the Mille Lacs Band's 1837 treaty hunting and fishing privilege, and substantial evidence, particularly Commissioner Manypenny's treaty transmittal letter, showing that the government's intent in drafting the second sentence of Article 1 was to ensure that all of the Chippewa's various and overlapping *land* claims were extinguished.[27] PA 327-28. The first, and perhaps clearest, manifestation that the United States did not intend to abrogate the Band's 1837 treaty privilege is the 1854 treaty, which *preserved* the 1837 treaty rights of the Wisconsin and Fond du Lac Bands, and expressly established *new* hunting and fishing rights for the Fond du Lac and other Chippewa residing in the territory ceded by that treaty.[28] PA 31-34, 191-201. As the district court reasoned,

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(Cont'd)
order to overcome clear treaty language." Pet. Br. at 49. As shown in the previous section, however, the treaty language contains no explicit statement abrogating the 1837 treaty privilege.

27. The Eighth Circuit properly reviewed the district court's findings regarding the intent of the parties on the basis of the clearly erroneous standard. PA 37; *see Pullman Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (intent is "a pure question of fact subject to Rule 52(a)'s clearly erroneous standard . . . , not a question of law and not mixed question of law and fact"). The petitioners do not take issue with the standard of review applied by the court of appeals.

28. The lower courts' holding that the 1854 treaty did not abrogate the Chippewa's 1837 treaty privilege was not challenged in any of the petitions for certiorari or in any of the briefs filed on the merits in this Court. Only the Landowners pursued this issue in the court of appeals, which found the evidence "overwhelming that neither party intended the 1854 treaty to disturb usufructuary rights." PA 31-34 and n. 27.

> [i]f the government had intended to extinguish the 1837 privilege, it would have included a provision abrogating that privilege in the 1854 treaty because most of the bands that signed the 1837 treaty attended that treaty negotiation and were not invited in 1855.

PA 328-29.

Moreover, if Congress had sought to extinguish off-reservation hunting and fishing rights throughout the Minnesota territory, as petitioners suggest, it would not have ratified a treaty establishing *new* off-reservation treaty rights across the millions of acres of the 1854 ceded territory. *See Morton v. Mancari*, 417 U.S. 535, 548-49 (1974) (absent "any manifestation of supportive intent," where Congress had enacted two *new* Indian preferences, "we are loathe to imply [the] improbable result" that Congress intended to repeal Indian preferences in government employment). The petitioners fail to explain why Congress would have intended to abrogate the treaty hunting and fishing rights of the Mille Lacs Band, while leaving intact the reserved rights of all other Bands using the 1837 ceded territory and establishing new treaty rights in the 1854 ceded territory.[29]

The next manifestation of treaty intent, the legislation authorizing the 1855 treaty negotiations, 10 Stat. 598 (PA 532),

29. The petitioners' brief correctly points out that if the State were to prevail on its 1855 treaty defense, "the Mille Lacs Band would not have a special hunting, fishing and gathering privilege in the Minnesota portion of the 1837 ceded territory, but the other plaintiff bands, including the Wisconsin Bands, would." Pet. Br. at 41, n.17. The petitioners make no effort to explain the logic of this odd result. *See Yankton Sioux*, 139 L. Ed. 2d at 788 (court should apply "sensible construction" which avoids "absurd conclusion").

likewise "does not support the interpretation [of the 1855 treaty] presented by the [petitioners]." PA 328. The legislation makes no mention of treaty hunting and fishing rights on lands previously ceded, but instead authorizes negotiations for "the extinguishment of [the Chippewa's] *title* to all the lands *owned and claimed* by them."[30] PA 532 (emphasis added). Moreover, the legislation not only authorized the 1855 treaty negotiations, but provided retroactive authority for the 1854 negotiations, which *preserved* existing treaty hunting and fishing rights and established *new* treaty hunting and fishing rights over a vast area in northeastern Minnesota. PA 275. The lack of intent to extinguish treaty hunting and fishing rights is confirmed by the legislative history which expressly states that the treaties authorized by the legislation would "reserve[]" to the Indians "*those rights which are secured by former treaties.*" 23 Cong. Globe, 33rd Cong., 1st Sess. 1403-04 (June 15, 1854) (emphasis added)

The petitioners cite language from the authorizing legislation directing that the new treaty provide that

> the Laws of the United States and the Territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be "Indian country."

30. Commissioner Manypenny executed the congressional mandate by summoning the Chippewa to Washington for treaty negotiations "respecting their claims to lands in Minnesota," but made no suggestion that the negotiations would involve a cession of treaty hunting and fishing rights. PA 276-77. Furthermore, Manypenny did not summon to the negotiations all of the Bands who used and occupied the 1837 ceded territory, as would have been logical if he had sought to negotiate a cession of 1837 treaty rights. *Id.*

Pet. Br. at 47 (citing PA 533). However, the issue before the Court is not whether the 1837 ceded territory is still "Indian country," *see Alaska v. Native Village of Venetie*, 522 U.S. __, 140 L. Ed. 2d 30 (1998), but whether Congress intended to abrogate the Mille Lacs Band's 1837 treaty hunting and fishing privilege. The authorizing legislation is silent on the latter issue and its legislative history strongly indicates that prior treaty rights were to be preserved. 23 Cong. Globe, 33rd Cong., 1st Sess. 1403-04 (June 15, 1854). Furthermore, no language requiring the application of *territorial* law appears in the text of 1855 treaty itself, which provides simply that the Chippewa must "respect and observe the laws of the *United States, so far as the same are to them applicable*." PA 328, 512-13 (emphasis added).

The record of the 1855 treaty negotiations further confirms that the government intended to extinguish Chippewa land claims, not treaty hunting and fishing rights. The district court found that 1855 treaty journal contains no discussion of the 1837 treaty privilege, or hunting and fishing rights in general. PA 284, 325. The treaty negotiations instead focused on the obtaining a cession of Indian lands, as reflected by very first page of the treaty journal which indicates the negotiations were "required for the purpose of making a treaty for the purchase of a tract of land lying in Minnesota." JA 297; *see also* JA 304, 307, 309; JA 869 (Report of Dr. Tanner). The petitioners do not suggest that a cession of the 1837 treaty hunting and fishing privilege was ever proposed by government officials during the 1855 treaty negotiations.

The petitioners argue instead, without any citation to the record, that the shift in government policy away from removal and toward the establishment of reservations provides the "historical context" for an intent to extinguish treaty hunting and fishing rights. Pet. Br. at 45. However, the district court rejected this factual contention, finding instead that the

preservation of treaty hunting and fishing rights was "not inconsistent with Manypenny's reservation policy."[31] PA 289. Indeed, the legislative history for the 1854 authorizing act contains extensive discussion about the shift from the removal to the reservation policy, but makes clear Congress's intent that "rights which are secured by former treaties" would be unaffected by the establishment of reservations. 23 Cong. Globe, 33rd Cong., 1st Sess. 1403-04 (June 15, 1854). The petitioners' historian testified that Manypenny's reservation policy *allowed* for off-reservation hunting, fishing and gathering, that the policy did not confine the Indians to their reservations, and that the Mille Lacs Reservation was established because it provided access to off-reservation fisheries and wild rice fields. JA 1359, 1368-69 (Newell Cross); *see also Johnson v. Gearlds*, 234 U.S. 422, 438 (1914) (1855 treaty drafters contemplated that the Chippewa "while making their permanent homes within the reservations *would be at liberty to roam and to hunt throughout the entire country, as before*").

The petitioners also argue that 1855 treaty provisions stipulating that the Chippewa would "settle down in the peaceful pursuits of life" and promising governmental assistance with agriculture demonstrate an intent to abrogate treaty hunting and fishing rights.[32] Pet. Br. at 46-47. However, many other treaties

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31. In support of this finding, the district court noted that the 1854 Chippewa treaty and many other treaties negotiated in the mid-1850s expressly secured off-reservation hunting and fishing rights while at the same time establishing reservations, and that only *one* treaty, the 1855 Sault Ste. Marie treaty, expressly abrogated treaty hunting or fishing rights and that followed the destruction of the fishery by a government canal project. PA 289; *see also Fishing Vessel*, 443 U.S. at 666 n.9.

32. The petitioners' expert testified that this provision "doesn't mean . . . that the chiefs agreed their people would stop hunting, fishing, trapping and gathering." JA 1388 (Driben Cross).

of this era encouraged the Indians to settle down on reservations and provided agricultural assistance while at the same time preserving off-reservation hunting and fishing rights. *E.g.* PA 493 (1854 treaty stipulations providing for allotment of land in severalty and agricultural assistance). The 1855 treaty itself, while not establishing new special hunting and fishing rights, nevertheless promised the Chippewa gunpowder, shot, lead and gilling twine to enhance their hunting and fishing activities. PA 509; *see also Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 364-65 (7th Cir.) ("government's provision of guns and ammunition to the Indians pursuant to the 1854 treaty" is evidence that the government did not intend that treaty to abrogate the Chippewa's usufructuary rights), *cert. denied*, 464 U.S. 805 (1983).

Commissioner Manypenny's February 23, 1855, transmittal letter, which was presented to the Senate during the treaty ratification process, demonstrates clearly that the government intended that the second sentence of Article 1 would extinguish the Chippewa's remaining *land* claims, not their previously reserved treaty hunting and fishing rights. JA 291-94. Manypenny's letter explains that the second sentence of Article 1 was included in the treaty because the "Indians (and *especially the Pillager and Lake Winnibigoshish bands*) have *some right or interest* in a large extent of other lands in common with other Indians *in Minnesota*." PA 286; JA 291-92 (emphasis added). There is no reference to the 1837 privilege in Manypenny's transmittal letter and the explanation Manypenny provided for the cession language bears no relation to the 1837 privilege.[33] That privilege was not held "especially" by the Pillager and Lake Winnibigoshish bands, who occupied lands

33. Indeed, Manypenny's letter asserted (erroneously) that the bands party to the 1855 treaty "have not been parties to or participants in the benefits of any treaty with the United States," other than an "unimportant" 1847 treaty. PA 288; JA 292.

far to the north and west of the 1837 cession (*see* App. A attached), and had disclaimed any interest in the 1837 territory during the 1837 treaty negotiations. PA 287; JA 47. The 1837 privilege was not "some [indefinite] right or interest" but a specific privilege secured by treaty. And, the 1837 privilege was not held in common with "other Indians in Minnesota," but largely with other Chippewa bands in Wisconsin. PA 287.

Manypenny's transmittal letter strongly supports the district court's finding that

> Manypenny intended for the second sentence of Article 1 of the 1855 treaty to extinguish Chippewa *land claims*, especially those of the Pillager and Lake Winnibigoshish bands, to unceded lands in northwestern Minnesota.

PA 327-28 (emphasis added). Based on the 1847 map he had forwarded to Gilbert in preparation for the 1854 treaty (App. B attached), the 1848, 1849 and 1850 annual reports (JBA 105, 118-19; JA 187), and Rice's December 17, 1854, letter (JA 287), Manypenny understood that the Pillager bands claimed lands to the north and west of the tract defined in the first sentence of Article 1. The district court quite reasonably found that Manypenny's uncertainty about the precise nature of the Pillagers' interest in these lands ("some right or interest")[34] and the Pillagers' refusal to define the full extent of their land claims during the negotiations,[35] led to the drafting of the broad

34. The Commissioner's 1850 annual report explained that the Pillager claims went beyond the 1825 Prairie du Chein lines, *see* note 2 above, arose in some manner from "conquest and actual possession," and overlapped those of the Red Lake bands. PA 287; JA 187.

35. Because the Mississippi and Pillager bands claimed different lands, Manypenny insisted that the chiefs define their respective (Cont'd)

language of cession in the second sentence of Article 1. PA 286-88.

The petitioners apparently concede that the passage quoted above refers to the second sentence of Article 1, but argue that Manypenny's reference to lands in northwestern Minnesota does not support a "geographic limitation" on the treaty language of cession. Pet. Br. at 48. This misses the point. The issue is not whether the cession language is limited geographically, but whether the language was intended to extend beyond a cession of the Chippewa's remaining *land* claims and also abrogate their 1837 treaty hunting and fishing privilege. Manypenny's transmittal letter, which omits any reference to treaty hunting and fishing rights while explaining that the second sentence of Article 1 would extinguish the ill-defined land claims of the Pillager and Lake Winnibigoshish bands to the north and west of the demarcated cession boundaries (*see* App. A attached), is compelling evidence that the government's intent in drafting the broad language of cession in the 1855 treaty was to extinguish Chippewa land claims, not their 1837 hunting and fishing rights. As the district court reasoned, that interpretation does not rewrite the treaty or render the second sentence of Article 1 superfluous, "it merely limits the language to its intended effect." PA 328.

Finally, the government's "post-ratification conduct" provides no probative evidence that the treaty was intended to abrogate the Mille Lacs Band's 1837 treaty rights. *Zicherman v. Korean Air Lines*, 516 U.S. 217, 133 L. Ed. 2d 596, 607 (1996); *Floyd*, 499 U.S. at 546. After the 1855 treaty, Manypenny

(Cont'd)
boundaries before he could make a proposition to them. JA 313. The Pillager representative, Flat Mouth, demurred, stating that the Pillager and Lake Winnibigoshish bands would identify only those lands they wished to sell and would not "state precisely what our bands claim as a right." JA 317-18.

did nothing to correct the statement in Governor Gorman's February 1855 letter that the Mille Lacs Band still retained hunting and fishing rights under the 1837 treaty, and Gorman repeated his statement in a June 1855 letter to the Band. PA 269-71; JA 295-96. Notwithstanding complaints from non-Indians about Chippewa off-reservation hunting and fishing, and calls by the State to confine the Mille Lacs Band to its reservation, federal officials continued to support off-reservation hunting and fishing, never suggesting that the 1855 treaty had any effect on the Chippewa's 1837 treaty privilege until approximately 70 years *after* the treaty.[36] PA 293, 299-300. The petitioners' interpretation of the 1855 treaty is thus at odds with the contemporaneous understanding of the parties to the treaty.

36. The petitioners contend that state statutes adopted in 1858 set seasons and "expressly applied those seasons to Indians hunting off their reservations." Pet. Br. at 47, citing PA 569-72. In fact, two of the cited statutes (chs. XIX, XLV) make no mention of Indians, while the third (ch. XLIV) purports to assert overall criminal jurisdiction over Indians when found off-reservation, and require Indians to obtain a pass from federal officials before leaving their reservations. There is no evidence that these statutes had any relation to the 1855 treaty, or that the Federal Government ever instituted a pass system. Indeed, the statutes by own their terms would apply to the *1854* ceded territory where the Chippewa unquestionably retained off-reservation hunting and fishing rights.

Thompson *et al.* point to Henry Rice's statements during the Nelson Act negotiations as evidence of an understanding that the Mille Lacs Band's rights had been abrogated. Th. Br. at 9-10, 32. However, Rice never stated that the Band's 1837 treaty rights had been abrogated; he simply suggested that the State had the power to set deer hunting seasons. PA 297; JA 471-72. It is well established that the State *does* have the power to set seasons for Indian hunting, provided that the seasons are non-discriminatory and necessary for conservation. *Antoine*, 420 U.S. at 207. The district court also found that Rice's comments were "not persuasive evidence" that the 1837 privilege had been abrogated, because the United States negotiators made similar comments in discussions with the Grand Portage Band, which clearly retained usufructuary rights under the 1854 treaty. PA 297-98; JA 499.

B. There Is No Evidence that the Chippewa Intended to Relinquish their 1837 Hunting and Fishing Rights.

The district court also found that the Mille Lacs Band did not intend to relinquish its 1837 treaty rights when it signed the 1855 treaty, and did not understand the 1855 treaty to have that effect. PA 292, 324. The evidence strongly supports this finding. The Chippewa were told and understood that the treaty would involve a cession of their unceded lands,[37] and were never asked to cede their guaranteed privilege of hunting, fishing and gathering in the 1837 ceded territory. PA 284. The Mille Lacs Chippewa would have starved if they had been unable to hunt and fish outside of the small reservation established by the 1855 treaty and "would not have knowingly given up the guaranteed [1837] privilege without any discussion." PA 292, 325. The lack of any mention of these important treaty rights in the 1855 treaty journal is thus strong evidence that the Mille Lacs Band did not understand the 1855 treaty to have this effect. *See Fishing Vessel*, 443 U.S. at 676 (given importance of fishing to Indians, it was "inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish").

The petitioners argue that "the context of extinguishment was reflected in the goals of the Chippewa leaders" because Hole-in-the Day, a Chippewa spokesman, sought money and tools to enable the Indians to adopt agricultural ways and "live like the whites." Pet. Br. at 45-46 & n.20. While there is no dispute that Hole-in-the-Day at times espoused assimilation, the district court found that his views were not shared by the Mille Lacs Chippewa, who were at this time fighting to protect their wild rice fields from the

37. Flat Mouth remarked: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." JA 309. Hole-in-the-Day likewise stated: "Your words strike us in this way. They are very short. 'I want to buy your land.' These words are very expressive, very curt." JA 304.

Rum River dam. PA 291-92. The district court also found that the Chippewa representatives understood that their people would need to hunt, fish and gather off the small reservations created by the 1855 treaty in order to survive and would not have acquiesced without discussion to any restrictions on their legal rights to engage in these activities in the 1837 ceded territory.[38] PA 325; *see also* JA 598-607 (first-hand, contemporaneous account showing the extent of Chippewa dependency on hunting, fishing and gathering in the late 1850s), 1386-87 (testimony of State's expert that Chippewa representatives did not intend the 1855 treaty to restrict their people from using natural resources). Indeed, after the 1855 treaty was signed, the Chippewa representatives, including Hole-in-the-Day, expressed great concern that annuity payments under the treaty would not interfere with the Chippewa's fall fisheries. PA 289-90; *see also* JA 1090-91 (Testimony of Dr. Cleland).

Finally, notwithstanding repeated calls by State officials to confine the Mille Lacs Chippewa to their reservation and, after 1892, active efforts to regulate off-reservation hunting, fishing and gathering, the district court found that the Chippewa "continued to hunt, fish and gather off-reservation after the 1855 treaty" and "complained to federal officials that state enforcement of game regulations violated their rights under the 1837 treaty." PA 325-26. This "post-ratification conduct" further supports the district court's finding that the Chippewa did not intend to

38. The petitioners also cite a passage from the treaty journal in which Hole-in-the-Day asserts that he studied the treaty and concluded that "the Indians have given away all, and leave themselves no alternative but to work." JA 348-49. Read in context, this passage has nothing to do with relinquishing hunting and fishing rights. Hole-in-the-Day was concerned that prior treaties which paid farmers and blacksmiths to work for the Chippewa had encouraged dependency. *Id.* He understood that, because they were ceding all of their remaining lands, the Chippewa would not be able to cede lands in the future in return for annuity payments, and therefore would have to work for themselves. Notably, the treaty journal indicates that this "work" would include fishing, hunting and trapping, as well as farming and other trades. *See* JA 1089-92 (Testimony of Dr. Cleland).

relinquish their hunting and fishing rights under the 1837 treaty. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-99 (1919) (continued in common use of fishing places "shows clearly that [the Indians'] understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States").

To sum up, this Court has held repeatedly that the intent to abrogate Indian treaty rights must be "clear and plain." *Yankton Sioux*, 139 L. Ed. 2d at 786. In this case, the relevant language from the 1855 treaty is ambiguous at best, and the evidence from the surrounding circumstances provides no indication that either party intended to extinguish the Mille Lacs Band's 1837 treaty privilege. The historical record shows that the purpose of the broad treaty language in the second sentence of Article 1 was to ensure that all of the Chippewa's ill-defined *land* claims were fully extinguished. Not a single document in the historical record surrounding the negotiation and ratification of the 1855 treaty even *mentions* the Chippewa's hunting and fishing rights under the 1837 treaty. Petitioners suggest *no* reason why the United States would have sought to extinguish the rights of the Mille Lacs Band, after preserving the rights of the Wisconsin and Fond du Lac Bands and creating *new* hunting and fishing rights in the 1854 treaty. Nor do the petitioners offer any reason why the Mille Lacs Chippewa, who remained vitally dependent on hunting, fishing and gathering, would have knowingly relinquished the 1837 privilege without discussion. To construe the 1855 treaty to extinguish the Mille Lacs Band's 1837 treaty privilege, without any "clear and plain" manifestation of congressional or tribal intent to extinguish the privilege, would run afoul of this Court's admonition that treaty rights may not be "easily cast aside" in a "backhanded" manner. *Dion*, 476 U.S. at 738-39; *Menominee*, 391 U.S. at 412.

CONCLUSION

For all of the foregoing reasons, the Eighth Circuit's ruling that the Mille Lacs Band's hunting and fishing rights were unaffected by the 1855 treaty should be affirmed.

Respectfully submitted,

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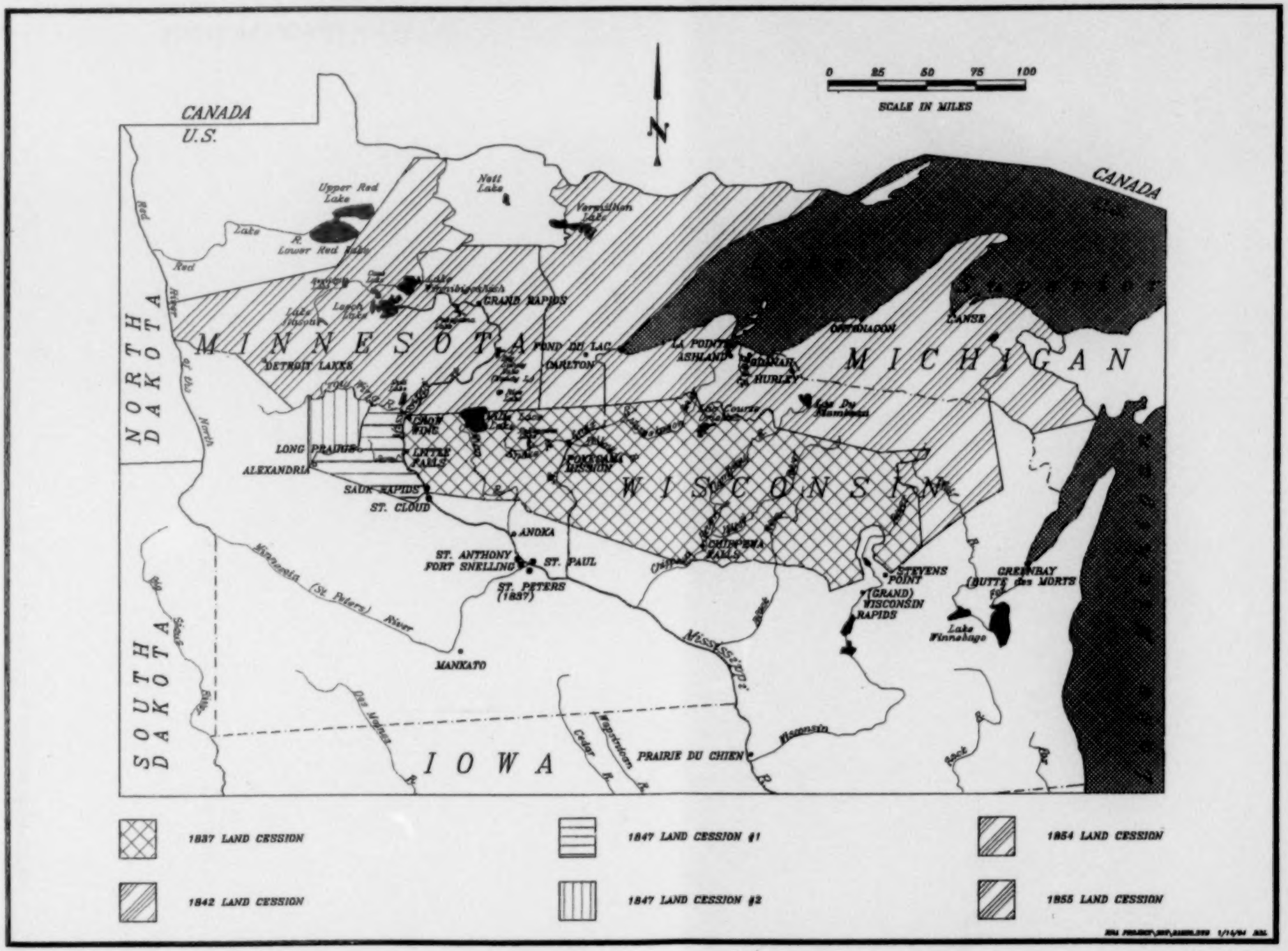
APPENDIX

APPENDIX A — CHIPPEWA LAND CESSIONS, 1837-1855 (DEFS. EXH. 1, PAGE 13; JOINT APPENDIX PAGE 956)

CHIPPEWA LAND CESSIONS, 1837–1855



APPENDIX B — 1847 WAR DEPARTMENT MAP SHOWING CHIPPEWA LAND CLAIMS (PLS. EXH. 179; JOINT APPENDIX PAGE 133)

PLAINTIFF'S EXHIBIT
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